

DA1JBIN1

Trial

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

12 Cr. 152 CM

5 MICHAEL BINDAY,  
a/ka/ Sealed Defendant 1,  
6 JAMES KEVIN KERGIL,  
a/k/a Sealed Defendant 2,  
7 and MARK RESNICK,  
a/k/a Sealed Defendant 3,

8 Defendants.

9 -----x

10  
11  
12 October 1, 2013  
10:12 a.m.

13  
14  
15 Before:

16 HON. COLLEEN McMAHON,

17 District Judge  
18 and a jury  
19  
20  
21  
22  
23  
24  
25

DA1JBIN1

Trial

## APPEARANCES

PREET BHARARA,  
United States Attorney for the  
Southern District of New York  
SARAH McCALLUM,  
ZACHARY FEINGOLD,  
EUN YOUNG CHOI,  
Assistant United States Attorneys

MORVILLO ABRAMOWITZ GRAND IASON & ANELLO, P.C.  
Attorneys for defendant Binday  
BY: ELKAN ABRAMOWITZ, Esq.  
BENJAMIN SEAN FISCHER, Esq.  
JASMINE MARIE JUTEAU, Esq.  
Of counsel

GALLET DREYER & BERKEY, LLP,  
Attorneys for defendant Kergil  
BY: ROGER LEE STAVIS, Esq.  
ADAM MICHAEL FELSENSTEIN, Esq.  
Of counsel

LAW OFFICES OF JANE ANNE MURRAY  
Attorneys for defendant Resnick  
BY: JANEANNE MURRAY, Esq.  
Of counsel

DA1JBIN1

Trial

1 (Trial resumes)

2 (In open court; jury not present)

3 THE COURT: I'm sorry.

4 THE CLERK: Come to order. Case on trial continued,  
5 the government and the defendants are present. The jurors are  
6 not present.

7 MR. ABRAMOWITZ: Good morning.

8 THE COURT: I apologize. The dental problem flared up  
9 again. The government has something that it wishes to do  
10 before it rests, I believe?

11 MS. McCALLUM: Yes, your Honor, there are some  
12 additional exhibits that we plan to read and publish to the  
13 jury. There is a stipulation, final stipulation the parties  
14 have been able to agree upon which I can hand up to the court  
15 now. We would ask that be read to the jury.

16 THE COURT: This is not the scenario that we planned  
17 out yesterday, which is that everything was going to get done  
18 yesterday except you were going to dot the I's and cross the  
19 T's. You weren't going to read anything, weren't going to have  
20 the jury in here. Now I can't do motions now. Now I can't do  
21 that now. I am really annoyed.

22 MS. McCALLUM: I apologize if there was some  
23 confusion. The government did let the court know we had  
24 additional exhibits.

25 THE COURT: Additional exhibits mean you introduce

DA1JBIN1

Trial

1       them and talk about them during summation.

2               MS. McCALLUM: Your Honor, I believe we said --

3               THE COURT: I would have had the jury come in. Now we  
4       would have done it and I would have sent them off for a long  
5       lunch.

6               MS. McCALLUM: The parties at least understood what  
7       the state of --

8               THE COURT: I didn't understand.

9               MS. McCALLUM: I apologize for that, your Honor.

10              THE COURT: I understood, I understood that we would  
11       be in a position to argue motions. We're not, not if the jury  
12       is going to hear additional evidence.

13              MS. McCALLUM: I think we had understood we would be  
14       in a position to have the motions heard, with the understanding  
15       that there was a little bit left of the government's case to  
16       come in. The defense counsel is aware of what that is. It is  
17       just e-mails and bank records to publish. We do have that  
18       stipulation which we referenced yesterday that had to be  
19       completed by the parties, and the only other thing is some  
20       additional exhibits the government will just offer.

21              MR. ABRAMOWITZ: Your Honor, my defense lawyer  
22       instincts wants to come to the defense of Ms. McCallum, but  
23       certainly not in front of the jury. I believe your Honor said  
24       that they could rest before the jury comes in, we could do the  
25       motions as long as they are not going to put on any more

DA1JBIN1

Trial

1 evidence.

2 THE COURT: I tell you what we'll do. Offer your  
3 evidence. We'll admit it. You can rest. They won't be  
4 allowed to introduce any more evidence, and when the jury comes  
5 in, you can exhibit to the jury whatever you want to exhibit to  
6 the jury, okay? That is what we'll do.

7 MS. McCALLUM: That is fine, your Honor. Thank you.

8 MR. ABRAMOWITZ: Sarah, I'll send you a bill.

9 THE COURT: Okay.

10 MR. FISCHER: Your Honor, just one clarifying point on  
11 Government Exhibit 5001, I think the stipulation that was just  
12 handed up to you. The parties have agreed to put an oral  
13 stipulation on the record as to that, and to a piece of that, I  
14 don't think that oral stipulation needs to be read -- sorry.  
15 Pardon me. The government corrects me. 5006.

16 THE COURT: Is that this list? No?

17 MR. FISCHER: I may be talking about --

18 THE COURT: Wait! 5006? There is something marked  
19 5006.

20 MR. FISCHER: Anyway, there is an oral stipulation  
21 that we agreed to, and we are going to want to tell you about  
22 it.

23 THE COURT: Okay. I mean I see why this is coming in.

24 I am perfectly happy, we can tell the jury that the  
25 parties have stipulated in Government Exhibit 5006, that

DA1JBIN1

Trial

1 certain commissions and certain amounts were paid by certain  
2 insurance companies in respect of certain policies to the  
3 following companies: R. Bindow, CPS Insurance services, Crump  
4 Life Insurance Services, Denise Bindow Koslowsky, Lynn Bindow,  
5 Madison Brokerage, and there is a stipulation that sets out all  
6 the details of that. That is enough for the jury, I think.

7 MR. FISCHER: Correct. I can give our oral  
8 stipulation right now, your Honor, if it is acceptable to the  
9 government. I will read it to from my iPad. It is  
10 memorialized, and I want to make sure I get every word right.

11 THE COURT: This is my first iPad stip.

12 MR. FISCHER: I am proud to be part of this moment.  
13 (Pause) Whenever your Honor is ready?

14 THE COURT: Yes.

15 MR. FISCHER: The parties agree that the numbers set  
16 forth in Government Exhibit 5006 will not bind any defendant in  
17 any other proceeding, including sentencing in this case, and  
18 that all defendants enter into this stipulation without  
19 prejudice and with full reservation of their rights in  
20 connection with any other proceeding, including sentencing in  
21 this case.

22 MR. FEINGOLD: The government agrees to that  
23 stipulation, your Honor.

24 THE COURT: Okay. That is definitely not a  
25 stipulation that the jury needs to hear.

DA1JBIN1

Trial

1 MR. FISCHER: Correct. That is appreciated, your  
2 Honor.

3 THE COURT: Okay. I hear it. All right. That is  
4 what we'll do with 5006. So why don't you, Ms. McCallum,  
5 introduce the rest of your exhibits.

6 MS. McCALLUM: Your Honor, I understand counsel just  
7 needs a moment to double-check the exhibits and then we will  
8 offer them.

9 THE COURT: Cool!

10 MR. ABRAMOWITZ: Your Honor, we handed to Mr. O'Neill  
11 supplemental requests to charge which we have served on the  
12 government as well.

13 THE COURT: Okay. I'll have an opportunity to -- I  
14 assume you just love the charge I gave you yesterday.

15 MR. ABRAMOWITZ: It looked like a repeat of the  
16 government's request.

17 THE COURT: No, no. It is definitely a McMahon  
18 charge. The government just uses a lot more words, a whole lot  
19 more words.

20 MR. ABRAMOWITZ: There were things from your motion in  
21 limine that weren't in there, so that we just ask you to put  
22 that in and some other things.

23 (Recess)

24 MS. McCALLUM: You have a list. At this time the  
25 government offers all exhibits on this list except Government

DA1JBIN1

Trial

1 Exhibit 2005.

2 THE COURT: I am going to cross it out, okay. We will  
3 give it to the court reporter. The court reporter will know it  
4 is not in evidence.

5 MS. McCALLUM: Yes.

6 THE COURT: Any others?

7 MS. McCALLUM: The government offers the remainder.

8 THE COURT: Any objection?

9 MR. FISCHER: Just a moment to confer with Ms.  
10 McCallum.

11 MR. FELSENSTEIN: We have no objection.

12 MR. FISCHER: No objection.

13 MS. McCALLUM: I understand there is no objection.

14 THE COURT: Fine. All of these exhibits, and I will  
15 give this to the court reporter on the document legend,  
16 government exhibits to be offered 10-1-2013 are admitted. I  
17 have crossed out the one that is not offered. The number of  
18 the exhibit --

19 MS. McCALLUM: What I might propose, your Honor, is  
20 that we provide to the court reporter a clean version of this  
21 that does not have the description of the documents beside it  
22 and omits 2005. We can get that to the court reporter  
23 hopefully by the end of today.

24 THE COURT: Fine.

25 THE CLERK: It will be marked?



DA1JBIN1

Trial

1 MS. McCALLUM: Government Exhibit 6001.

2 THE COURT: Okay.

3 (Government Exhibit 6001, except Government Exhibit  
4 2005, received in evidence)

5 THE COURT: Good. Now, with the introduction of that  
6 evidence, does the government have any more evidence that it  
7 wishes to introduce?

8 MS. McCALLUM: There is nothing further it wishes to  
9 introduce, your Honor.

10 THE COURT: Well, then there are three magic words  
11 that should be the next words out of your mouth.

12 MS. McCALLUM: The government rests.

13 THE COURT: I love those words!

14 Okay. And you'll get to say them again, all right?  
15 Let's do old business first and then new business.

16 Old business is that I have a mistrial motion. I have  
17 to find the papers. We are going to do it in the following  
18 order. We are going to do the mistrial motion, we are going to  
19 do Rule 29 motions, and then we'll talk about the defense case.

20 I have read your submissions of this morning. You've  
21 listed all my favorite cases. For substantially the reasons  
22 articulated in the government's letter of October 1, 2013, the  
23 motion for mistrial is denied. There is no need for a hearing.

24 I think at the end of the defendants' letter, the end  
25 of Mr. Stavis' letter, he cites my favorite, favorite case,

DA1JBIN1

Trial

1 United States versus Cromitie, for the proposition that  
2 Cromitie makes clear that when the government proffers a  
3 witness who has knowingly committed perjury, even if such  
4 perjury was committed outside of court, it can be grounds for  
5 new trial. Boy, if it was not grounds for a new trial in  
6 Cromitie, it is not grounds for new trial or mistrial here.

7 Mr. Krupit was either very careless or badly advised,  
8 and the government, I believe, was careless in not ascertaining  
9 that which Mr. Stavis was able to ascertain, just as I believe  
10 the government was careless virtually to the point of  
11 misconduct in Cromitie in not uncovering the unbelievably  
12 extensive evidence of Mr. Hussain's virtually daily career as a  
13 serial perjurer.

14 Mr. Stavis, you can sit down.

15 MR. STAVIS: Will I be able to stand up when --

16 THE COURT: You can. I am making a ruling. I have  
17 read and I am denying your motions. You have made your record.  
18 You have made it in writing.

19 MR. STAVIS: I have it, your Honor. When your Honor  
20 finishes, I wish to have one minute and 15 seconds.

21 THE COURT: Say your one minute and 15 seconds worth  
22 of stuff.

23 MR. STAVIS: First of all, in terms of favorite case,  
24 Cromitie and the Second Circuit cited two cases I argued in the  
25 Second Circuit United States versus Al Kassar, A L, K A S S A

DA1JBIN1

Trial

1 R, 660 F.3d 108, and United States versus Rahman, R A H M A N,  
2 189 F.3d 88, both of which I argued. The quote from Al Kassar  
3 in the Cromitie decision, your Honor, is government  
4 involvement, "Government involvement in a crime when the theory  
5 becomes so excessive, it violates due process."

6 THE COURT: The government wasn't involved in the  
7 crime. All the government -- assuming Mr. Krupit was  
8 committing a crime, the government very carelessly did not find  
9 out that he did it. That is not what you were arguing in that  
10 case, and you know it.

11 MR. STAVIS: Your Honor, that was an entrapment case.

12 THE COURT: So was Cromitie. This is not an  
13 entrapment case.

14 MR. STAVIS: That's correct. The government  
15 misconduct, and if I might finish the quote, violates due  
16 process, requires the dismissal of charges against the  
17 defendant. The government --

18 THE COURT: If, if, if, if, right.

19 MR. STAVIS: And that gets to the --

20 THE COURT: When I was a law student, first year law  
21 student, my father, probably the best lawyer I ever knew, would  
22 sit at the dinner table with me when I was on break and he  
23 would listen as I expounded on some great language from some  
24 this case or that case, and eventually after I had made my  
25 brilliant point, he'd look at me and he'd say, "And how did the

DA1JBIN1

Trial

1 case come out?"

2 Generally speaking, the language on which I had  
3 seized, much like the language you seized on in Cromitie,  
4 sounds real good, but it didn't get you anywhere.

5 MR. STAVIS: Your Honor, I just --

6 THE COURT: In Cromitie, for example, where the lying,  
7 the lying by Mr. Hussain, undiscovered by the government, was  
8 infinitely greater than the lying in this case, the Second  
9 Circuit did not reverse the convictions, did not grant a new  
10 trial. None of those things happened. They're in jail for the  
11 next 25 years.

12 MR. STAVIS: Yes, your Honor. What I want the record  
13 to be clear about saying, I am saying I am not relying  
14 exclusively on Cromitie.

15 THE COURT: No. You're relying on the cases cited in  
16 Cromitie.

17 MR. STAVIS: The point I wish to make is the  
18 government's conduct gave the green light to its cooperator to  
19 sell insurance, and the government should have known that that  
20 in itself was a crime. Without the government's conscious  
21 avoidance, there would have been no crime. Your Honor used the  
22 word careless, quote, to describe what the government did. I  
23 submit to the court, without an evidentiary hearing, your Honor  
24 cannot draw that conclusion they were careless.

25 THE COURT: Guess what. You take that to the circuit

DA1JBIN1

Trial

1 if you're unlucky enough to go there because I am not granting  
2 a mistrial or Kyles Hearing on this issue. I am not. I don't  
3 think you're entitled to one. The jury listened as you  
4 skillfully surgically exposed this man for having lied  
5 repeatedly, and the government, to its credit, did not attempt  
6 to rehabilitate him. He wanted to explain, he wanted to  
7 explain that his lawyer told him it was all right.

8 I wouldn't let him on cross. The government did not  
9 try to elicit that on redirect. The lies are there. The  
10 argument is there. You've got the argument. I see absolutely  
11 no difference, no difference between this situation and  
12 Cromitie, except that having sat through his testimony and  
13 having sat through Hussain's testimony, he lied a lot less than  
14 Mr. Hussain did on fewer occasions and about fewer things. So  
15 anyway, those motions denied.

16 Now, there are Rule 29 motions, I assume?

17 MR. ABRAMOWITZ: Yes, your Honor.

18 THE COURT: Mr. Abramowitz.

19 MR. ABRAMOWITZ: I believe I am making this motion on  
20 behalf of all three defense counsel.

21 MS. MURRAY: Yes.

22 THE COURT: They probably want to say something  
23 anyway.

24 MR. ABRAMOWITZ: If I miss something, I am sure  
25 they'll be first to say so.

DA1JBIN1

Trial

1           Your Honor, we make a motion under Rule 29 for the  
2 entry of judgment of acquittal because the evidence that has  
3 been adduced by the government is simply insufficient to  
4 sustain a conviction. I say that with particular reference to  
5 United States against Guadagana, G U A D A G A N A, 183 F.3d  
6 122 (2d Cir.) in which the court said, "The court may grant a  
7 judgment of acquittal for insufficient evidence only if the  
8 evidence that the defendant committed the crime alleged was  
9 nonexistent or meager."

10           I want to focus on the meager. Your Honor's ruling on  
11 the motion in limine, which we are not rearguing now, did say  
12 that the government would have to prove that the insurers would  
13 have suffer some sort of tangible economic harm as a result of  
14 the loss of the right to control their decision to issue STOLI  
15 policies.

16           I would agree that taking all the favorable inferences  
17 as you must to the government at this stage, that they have  
18 proved that the -- or they offered proof that the insurance  
19 companies did not want STOLI policies; and, therefore, to the  
20 extent that our clients presented STOLI policies, they lost  
21 their right to refuse that business or they arguably lost their  
22 right to refuse that business. However, the second arm of that  
23 is that that's insufficient, according to your Honor's ruling,  
24 and there additionally has to be a tangible economic harm.

25           Now, with respect to that issue, 16 witnesses were

DA1JBIN1

Trial

1 called by the government. Only two were in a position to speak  
2 to the alleged impact, and that is Messrs. Avery and Burns.  
3 They simply proved that there was no tangible economic harm,  
4 and I make reference to the fact Mr. Avery's testimony,  
5 Transcript Pages 514, he was asked how STOLI entering the  
6 market impacted Prudential's bottom line, to which he  
7 responds -- and it is not only the bottom line that I am  
8 talking about --

9 THE COURT: But the question -- I remember the  
10 question vividly because the question was bottom line. The  
11 question wasn't directed to anything else. We have already  
12 established beyond peradventure that the bottom line is not the  
13 only indicia of economic, tangible economic injury.

14 MR. ABRAMOWITZ: I agree with you. It could be an  
15 indication. It isn't in this case. That is my point, and we  
16 are going to move down to other aspects of economic harm.

17 He said in testimony, he testified we didn't see any  
18 different experience because we tried as best not to sell any.  
19 So as far as the bottom line is concerned, he acknowledged that  
20 that wasn't what he was talking about.

21 He further stated that had the representations at  
22 issue not been present in the relevant applications, the result  
23 would have been that we would not issue the contract, period.  
24 That is simply the right to control. He testified on Page 701  
25 of the transcript that he believed the most significant risks

DA1JBIN1

Trial

1 of IOLI were social, legal, tax-related, not economic, and he  
2 used the word, "not economic."

3 That means that as far as a tangible economic impact,  
4 that he acknowledged there was no economic impact.

5 THE COURT: Since we are all fixated on the in limine  
6 motion, can I make the point that I think what I said was that  
7 it wasn't enough to show, for the government to show that the  
8 insurance company wouldn't have entered into the transaction.

9 MR. ABRAMOWITZ: Correct.

10 THE COURT: I think those were the words I used. Am I  
11 right about that?

12 MR. ABRAMOWITZ: Yes.

13 THE COURT: I didn't say it is not enough for the  
14 government to show loss of the right to control property. I  
15 said it is not enough for the government to show that the  
16 insurance company would not have entered into the transaction.

17 MR. ABRAMOWITZ: You did say that.

18 THE COURT: I want to be real sure.

19 MR. ABRAMOWITZ: You used the word, "economic harm."

20 THE COURT: But I think it is the law that the right  
21 to control, the loss of the right to control one's property  
22 constitutes tangible economic harm.

23 MR. ABRAMOWITZ: No, that is the Shellef case and that  
24 is what is missing here. It is not enough. The right to  
25 control is simply not enough. It is an intangible right. .



DA1JBIN1

Trial

1 Let me quote to you what you said in the in limine motion.

2 THE COURT: I have got it here. I am looking at it.

3 MR. ABRAMOWITZ: You said they must prove that the  
4 insurers would have suffered some sort of tangible economic  
5 harm as a result of a loss of --

6 THE COURT: But I went further. I was really  
7 specific. I said if the government can prove that the victims  
8 did not get what they bargained for, if they thought they were  
9 bargaining for universal life, and they ended up getting STOLI,  
10 which they didn't want, that would be enough. That would do  
11 it.

12 MR. ABRAMOWITZ: That is not what you said.

13 THE COURT: That is what I said, if the government can  
14 prove that the victims did not get what they bargained for  
15 rather than exactly what they paid for.

16 MR. ABRAMOWITZ: You also said --

17 THE COURT: There was a discrepancy between the  
18 benefits reasonably anticipated universal life and the benefits  
19 actually received STOLI, then the mail and wire fraud statutes  
20 are properly invoked and a conviction may be I obtained.

21 Indeed, I think I went on to say I think the  
22 government made a mistake when it started talking about rights  
23 to control because if you think you're not selling a STOLI  
24 policy because you have a policy against not selling STOLI,  
25 against selling STOLI policies, and you end up selling a STOLI

DA1JBIN1

Trial

1 policy because someone tells you a lie, there is a discrepancy  
2 between what you bargained for and what you got.

3 MR. ABRAMOWITZ: What they bargained for, your Honor,  
4 with respect, is an insurance policy that contained the right  
5 to sell, and that is where the analysis falls apart. Your  
6 Honor said, in quote, and I am quoting, "The government cannot  
7 prevail if it does not introduce evidence that the insurers  
8 suffered; for example, the harms outlined at Paragraph 18 of  
9 the indictment which qualify as financial harm as pleaded in  
10 Paragraph 4."

11 And there are several economic issues that are listed  
12 in the indictment at Paragraph 4. The government did not prove  
13 them. In fact, they proved the opposite, proved that these are  
14 intangible property rights.

15 THE COURT: So is goodwill. Goodwill is an tangible  
16 property right.

17 MR. ABRAMOWITZ: Goodwill can be a balance sheet item,  
18 is financial. I am sorry, your Honor, it is.

19 THE COURT: It --

20 MR. ABRAMOWITZ: Loss of reputation and some worry  
21 about tax status is an intangible right. It is not, has no  
22 economic impact whatsoever, and if it does, it wasn't proved.

23 There wasn't a witness that said we suffered any  
24 tangible economic harm here. They said the opposite. They  
25 didn't want the STOLI policies, there is no question about

DA1JBIN1

Trial

1 that, but there was no economic harm offered, no dollars and  
2 cents on a balance sheet and no tangible economic harm.

3 Now, I want to go back to basics here, your Honor.  
4 The basic is that under McNally, a Supreme Court case that read  
5 the mail and wire fraud statutes to exclude intangible property  
6 rights and invited Congress to amend that statute, the only  
7 amendment that Congress did was for honest services. It did  
8 not amend 1341 or 1343 in any other way.

9 So that the ruling under McNally, as amplified under  
10 Skilling, which I agreed was an honest services case, but the  
11 language in Skilling talks about this has to be a money or  
12 property offense and not intangible rights.

13 Goodwill, your Honor, is an accounting function,  
14 goodwill under the Schwartz case does have a dollar and cents  
15 value. We didn't hear a peep about goodwill, about any  
16 economic impact other than they didn't want to do these  
17 applications. Right to control without what your Honor had  
18 added in the in limine motions does not satisfy the tangible  
19 economic harm.

20 If you need any cites -- in fact, they have an  
21 economic benefit. It was one exhibit, Exhibit 2972, where  
22 Mr. Burns said that the actual mortality experience on policies  
23 with with face amounts of a million or greater and issued to  
24 insured ages 70 or older, the STOLI demographic, is 88 percent  
25 of expected or 12 percent better or lower, and that suggests

DA1JBIN1

Trial

1 that STOLI activity has not had an adverse impact on our  
2 mortality experience.

3 So all we are getting from the government's case is  
4 pure right to control. We bring you back to Shellef. Shellef  
5 is a case that says that pure right to control is not a  
6 tangible economic harm.

7 Your Honor, I urge you to consider these arguments. I  
8 think McNally is the case, even though it is a 1987 Supreme  
9 Court case, that takes us there. The cases cited for -- and  
10 also if your Honor had told the government they should prove  
11 the harms in the indictment, they didn't come near proving the  
12 harms in the indictment.

13 THE COURT: We don't know. They don't have to prove  
14 the ones alleged in the indictment. What I said was if they  
15 proved those, that would be sufficient.

16 MR. ABRAMOWITZ: Well, they didn't. Therefore, what  
17 is left is testimony that really is clear that there was no  
18 economic harm. STOLI is a controversial type of life  
19 insurance. It can be dealt with in different contexts. It  
20 cannot be dealt with in the context of a crime of mail fraud  
21 because there was no economic harm, or at least we didn't hear  
22 any. Thank you.

23 MR. STAVIS: Your Honor, would your Honor like to hear  
24 briefly from defense counsel?

25 THE COURT: Yes, I would. It is your motion, after

DA1JBIN1

Trial

1 all.

2 MR. STAVIS: Yes, yes, your Honor.

3 The Shellef case, S H E L L E F, in 507 F.3d 82,  
4 refers to the essential elements of the bargain. I don't think  
5 that in the context of the conspiracy and the mail and wire  
6 fraud counts, as Mr. Abramowitz has said, I don't believe that  
7 that has been proven beyond a reasonable doubt. Even taking  
8 all the facts in the light most favorable to the government, as  
9 your Honor must, the right to control is not enough.

10 I also point out the individual facts, the law to the  
11 side, the individual facts with regard to my client, James  
12 Kevin Kergil, are insufficient with regard to the conspiracy to  
13 commit mail and wire fraud, the mail fraud and the wire fraud  
14 counts. With regard to Mr. Kergil, the government has not  
15 produced sufficient evidence beyond a reasonable doubt on the  
16 conspiracy to obstruct justice.

17 The elements necessary have not been proven  
18 specifically with regard to Mr. Kergil, and for those  
19 supplemental reasons, I move pursuant to Rule 29 for a judgment  
20 of acquittal.

21 THE COURT: Ms. Murray.

22 MS. MURRAY: Your Honor, I would second my co-counsel  
23 and especially Mr. Stavis' remarks about United States v.  
24 Shellef, and as to the essential nature of the insurance  
25 bargain, your Honor, fundamentally a life insurance bargain is

DA1JBIN1

Trial

1 a contract based on the health, gender and age of the  
2 individual and priced accordingly.

3 Lapse rates and the expectation of lapses are not an  
4 essential element of the bargain, but that is the only thing  
5 that the insurance company executives talked about on the stand  
6 as creating potential for economic harm. I simply say reliance  
7 on lapse rates is outside the essential nature of life  
8 insurance bargained, and for that reason the government hasn't  
9 proved its case on the mail fraud conspiracy.

10 I would like to then address the doctrine construction  
11 charge Mr. Resnick. There was some miscommunication between  
12 myself and Mr. Binday's lawyers early this morning. I had  
13 wanted the obstruction charge to simply be included again in  
14 our supplemental request this morning since I believe our  
15 charge is the better and more appropriate charge, and the  
16 reason for this is there was a "to wit" clause in the  
17 indictment which narrows very specifically what the obstruction  
18 was here.

19 The alleged obstruction was Mr. Kergil and Mr. Resnick  
20 agreed to destroy documents, and the word "destroy" was used,  
21 it wasn't alteration, wasn't mutilation, but it was destroy  
22 documents to make them unavailable for a grand jury proceeding.  
23 It is very specific as to document destruction and a grand jury  
24 proceeding. So the way the charge is currently written, it  
25 involves multiple different kinds of destruction, and it also

DA1JBIN1

Trial

1 has another object, just general obstruction of justice.

2 THE COURT: This is a charging conference issue.

3 MS. MURRAY: It is relevant to the motion to dismiss,  
4 your Honor.

5 THE COURT: Okay.

6 MS. MURRAY: Assuming, your Honor, I am correct the  
7 charge should be specific to the "to wit" clause in the  
8 indictment which the grand jury voted, I would submit that  
9 there is insufficient evidence that Mr. Resnick joined in a  
10 conspiracy to destroy documents.

11 First of all, the only witness who talked about any  
12 conspiracy was Mr. Krupit, and he actually admitted that Mr.  
13 Resnick was deemed to be taking the issue lightly. While there  
14 is a phone call where my client allegedly admits to doing it  
15 and flying down to Florida to do it, that phone call has to be  
16 viewed in the context both of what we know actually happened  
17 and in the context of the representation by counsel by both  
18 parties on that call and the fact my client is under no  
19 obligation to tell somebody, a potential co-defendant, that he  
20 is in possession of documents that that co-defendant or  
21 co-defendant's lawyer might want to have access to.

22 What we know happened was Mr. Resnick went to the  
23 Apple store. He created a mirror image. Whatever he did  
24 afterwards is completely irrelevant because he created an exact  
25 replica, a forensic copy of his hard drive. There was no

DA1JBIN1

Trial

1 destruction.

2 THE COURT: Great jury argument, Ms. Murray,  
3 absolutely fabulous!

4 All right. Let's hear from the government.

5 Are you prepared to have me charge United States  
6 versus Starr and try the case on that theory?

7 MS. McCALLUM: Your Honor, we --

8 THE COURT: You didn't get what you thought you were  
9 getting?

10 MS. McCALLUM: No, that is not our theory.

11 THE COURT: Why not?

12 MS. McCALLUM: This is a straightforward mail and wire  
13 fraud case. It is a straightforward case.

14 THE COURT: United States versus Starr is a  
15 straightforward mail fraud case.

16 MS. McCALLUM: Right. Your Honor, this is not a  
17 theory of the case in which we're claiming anything close to  
18 they just -- they wouldn't have issued the contract had they --

19 THE COURT: That is what they all said.

20 MS. McCALLUM: No, your Honor, they went much further.

21 I want to remind the court this is a straightforward  
22 case because what we are alleging is that there was a scheme to  
23 defraud insurance companies of money and property, deprive them  
24 of commissions, they wouldn't have paid these commissions had  
25 they known the truth, deprive them of the policies they



DA1JBIN1

Trial

1 wouldn't have issued and the costs they wouldn't have incurred  
2 had they known the truth.

3 Yes, it also deprived them of their right to control  
4 their economic decision-making. There is no need -- and the  
5 court has already said this, it is black letter law -- there is  
6 no need for the government to prove ultimate economic harm.  
7 There is a good reason why that is difficult to prove here, and  
8 it is not something we would ever have to prove.

9 Again this is a long game, and these insurance  
10 companies, the executives who took the stand and testified  
11 about the harms they foresaw with STOLI, they talked about  
12 reduced profitability, they talked about tax consequences, they  
13 talked about higher prices resulting from having to get  
14 reinsurers' approval. They talked about all these economic  
15 harms, these economic harms they were facing as a result of  
16 STOLI.

17 The Lincoln witness was particularly I think eloquent  
18 on this about the economic harms that the company viewed STOLI  
19 as posing. So what did they do? They incurred massive  
20 economic costs, not quantifiable necessarily, they described as  
21 soft costs, to try to limit STOLI, to try to stamp it out.  
22 That is why both those witnesses said we don't think ultimately  
23 so far we have seen a hit to the bottom line, but that is  
24 because we took all these measures, we think we stamped it out.

25 The government has presented overwhelming proof that

DA1JBIN1

Trial

1 these were economic harms that were posed by STOLI and that the  
2 lies the defendants told these insurance companies had economic  
3 impact or carried economic impact.

4 Now, in terms of what is alleged in the indictment,  
5 the specific harms alleged in the indictment were proved at  
6 trial. Both these witnesses talked about the way that lapse  
7 assumptions played into the pricing of STOLI policies, and that  
8 is one of the reasons they didn't want STOLI. That is why it  
9 posed reduced profitability.

10 They both talked about reduced cash flow from  
11 assumptions you make that human beings are going to be paying  
12 the premiums on these policies and are going to overfund them  
13 in some circumstances. He made assumptions about the  
14 population you're insuring. When those assumptions are thrown  
15 off because people are lying to you and sneaking investor-owned  
16 policies into the mix, that is an economic harm, and that is  
17 one of the harms alleged in the indictment.

18 Both witnesses also talked about the link between  
19 financial misrepresentations and the assumptions that are made  
20 in pricing policies. The assumption again is based on  
21 experience with these high face value policies and the people  
22 who buy them. There is a link between mortality and net worth,  
23 and when you're not getting the pool of applicants that you  
24 believe you're getting, that affects the economics of the  
25 transaction. So for all of those reasons, the Rule 29 motions

DA1JBIN1

Trial

1 should be denied on the first three counts of the indictment.

2 On the obstruction of justice charge, the court heard  
3 again overwhelming evidence there was a conspiracy. This is a  
4 conspiracy charge. There was a conspiracy to obstruct justice.

5 THE COURT: The government always charges conspiracy.  
6 God forbid they charge a substantive crime!

7 MS. McCALLUM: Here there was overwhelming evidence of  
8 a conspiracy to destroy documents, do destroy records. You  
9 heard testimony from the Apple witness that Mark Resnick came  
10 into that Apple store and asked for his hard drive to be wiped.  
11 He didn't need to have to ask to have his hard drive wiped to  
12 get a clone of that hard drive. You heard the phone calls in  
13 which Mr. --

14 THE COURT: And the testimony about the making of the  
15 clone, that was something that was done automatically?

16 MS. McCALLUM: No. It was something, the copy of the  
17 hard drive was transferred to a much smaller device.

18 THE COURT: I understand that. Did Mr. Resnick ask  
19 that a clone be made?

20 MS. MURRAY: Yes, your Honor. In the documents  
21 submitted by Apple, he paid for the external hard drive. He  
22 had to buy an external hard drive.

23 MS. McCALLUM: He did not have to ask have to ask to  
24 have his hard drive wiped.

25 THE COURT: He didn't have to ask for an iPhone 5,

DA1JBIN1

Trial

1 either, but the point here is that he, as I remember the  
2 testimony, he specifically asked that a copy be made.

3 MS. McCALLUM: I don't think the government would  
4 dispute that, but he also specifically asked that the hard  
5 drive on his computer that is sitting in his house be wiped.

6 THE COURT: Yes.

7 MS. McCALLUM: And the information, the data, he could  
8 keep it for himself perhaps, but the information could be kept  
9 on a much smaller device.

10 THE COURT: How does that frustrate a grand jury  
11 subpoena?

12 MS. McCALLUM: Your Honor, it makes it --

13 THE COURT: How does that frustrate a grand jury  
14 subpoena? I am not aware that that renders you incapable of  
15 responding to a grand jury subpoena just because you have it on  
16 a thumb drive instead of on your hard drive.

17 MS. McCALLUM: I think the evidence really here, and  
18 again returning to the conspiracy, this is a conspiracy charge,  
19 and you have the phone calls in which Mr. Resnick and  
20 Mr. Kergil are acknowledging they were in an agreement to  
21 delete e-mails. The evidence from Apple is just corroboration  
22 of the general conspiracy to obstruct justice through  
23 destruction of documents, through destruction of particular  
24 e-mails.

25 You have Mr. Krupit's testimony as well again

DA1JBIN1

Trial

1 establishing all three of these men had agreed to destroy  
2 documents, to delete everything with Advocate and R. Binday on  
3 it. The government is not going to contend all of those  
4 documents were, in fact, destroyed. Of course they weren't.

5 A bunch of them were presented at trial. A bunch were  
6 submitted at trial. We think all of this is sufficient to  
7 prove the conspiracy, and we think it is certainly sufficient  
8 to go to the jury. That addresses the fourth count, your  
9 Honor.

10 THE COURT: Okay.

11 MR. ABRAMOWITZ: I just want to repeat briefly that  
12 the benefit of the bargain language includes the right to sell  
13 and that every one of the lapse assumptions, the cash flow and  
14 the pricing and the premium financing, is bargained away with  
15 the right to sell. They have not --

16 THE COURT: What?

17 MR. ABRAMOWITZ: When you sell it, you sell it to a  
18 third party, he acknowledged that the lapse rate would be not  
19 expected. He acknowledged that it could be premium-financed.  
20 These are intangible harms that are subsumed in the right to  
21 sell.

22 THE COURT: I guess I didn't hear his testimony the  
23 same way you heard testimony. I thought he said that they  
24 would have priced the policy differently. Their pricing  
25 assumptions, the actuary guide, the pricing assumptions are

DA1JBIN1

Trial

1 impacted by the -- of course, they factor in a certain lapse  
2 rate, they factor in the fact that a policy could be sold, but  
3 in this case the policy is 100 percent going to be sold, and my  
4 understanding of the testimony that I heard was that the  
5 policies were mispriced because more of the policies were  
6 absolutely positively going to be sold, not just that they were  
7 alienable, they were going to be alienated from day one, and  
8 that was not factored into the pricing on the policy.

9 MR. ABRAMOWITZ: And what they did was raise the  
10 prices, okay? So what they did in response to STOLI was to  
11 raise the prices. They say to discourage it, but they got the  
12 money, so there is no harm.

13 Ms. McCallum's harm about we got commissions, they got  
14 the premiums and they got exorbitant premiums that they would  
15 not have gotten if these STOLI policies were not approved,  
16 again we are back to intangible economic harm. They didn't  
17 prove anything about the significance of the lapse rates.

18 THE COURT: I cannot say that I agree with you, Mr.  
19 Abramowitz.

20 MR. ABRAMOWITZ: You can try.

21 THE COURT: I cannot say that I agree with you. I am  
22 looking forward to hearing your argument.

23 MR. STAVIS: Very briefly, your Honor.

24 Adding to what Mr. Abramowitz just said, I recall that  
25 when Mr. Burns testified, he said the fight to STOLI was to

DA1JBIN1

Trial

1 raise the premiums on the policies, that is what his company  
2 did.

3 The point I want to make, a very discrete point, your  
4 Honor, Ms. McCallum spoke about lapse rates affecting  
5 profitability, assumptions. "Assumptions," she says it affects  
6 the, "economics of the transaction."

7 Those are all theoretical, your Honor. Those are  
8 theories that were proposed, and that is not sufficient  
9 evidence of mail and wire fraud and conspiracy to commit mail  
10 and wire fraud, those theories.

11 Turning to the obstruction, I would just point out  
12 since Ms. McCallum referenced the telephone conversation that  
13 was recorded by Mr. Krupit, when Mr. Krupit said Kevin, you  
14 told me to destroy e-mails, he said, "That is not what I said,"  
15 and, therefore, I would reiterate that the obstruction  
16 conspiracy charges have not been proven beyond a reasonable  
17 doubt.

18 THE COURT: All motions are denied.

19 Okay. Before we get to the defense proffer, give me  
20 five minutes, okay?

21 (Recess)

22 THE CLERK: The government and the parties are  
23 present. The jurors are not present, but they are present in  
24 the jury room.

25 THE COURT: Mr. Abramowitz is standing at the mike.

DA1JBIN1

Trial

1 MR. ABRAMOWITZ: Let me just, for your scheduling  
2 purposes, indicate to you that this is likely to take a half  
3 hour or more.

4 THE COURT: I think so.

5 MR. ABRAMOWITZ: The issue is what you want to do with  
6 the jury?

7 THE COURT: How much how much stuff does the  
8 government have to introduce to the jury? How much are we  
9 going to show them? How much are we going to read?

10 MS. McCALLUM: It is only about 15 minutes at most, I  
11 believe, your Honor.

12 THE COURT: They're not going to show them everything.  
13 They're only going to show them some stuff.

14 MR. STAVIS: The record will reflect I held my hands  
15 approximately 10 inches apart.

16 THE COURT: You know what? Let's bring the jury in.

17 I'll apologize because the delay is my fault, and  
18 let's show them what we're going to show them, tell them what  
19 we're going to tell them, let them rest, the government rest in  
20 front of the jury, and then I guess they'll just get an early  
21 lunch.

22 MR. ABRAMOWITZ: The motions will have been deemed  
23 made?

24 THE COURT: The motions will have been deemed made,  
25 right, and then we'll talk about what we are going to talk



DA1JBIN1

Trial

1 about. Let's bring in the jurors.

2 (Jury present)

3 THE CLERK: Be seated.

4 THE COURT: Good morning.

5 THE JURY: Good morning.

6 THE COURT: Entirely due to my fault, we are going to  
7 have the brief ending of the government's case and then I will  
8 have to waste your time and let you go for lunch.

9 As some of you may recall, I was having a root canal.  
10 I had some complications and I had to go see the dentist this  
11 morning so I got here late. As a result, we didn't get  
12 everything done that we were supposed to get done. My bad!  
13 I'll take all the blame. It means I have to waste a little bit  
14 of your time, and I apologize for that, but we did get some  
15 things done.

16 The government is ready to put in the last bits of its  
17 case. One of those things is a stipulation, which is  
18 Government Exhibit 5006, and I am not going to read every word  
19 of it. We all agreed that I can summarize it for you.

20 It is stipulated and agreed by all the parties that in  
21 connection with certain named life insurance policies, policy  
22 numbers and named of the insureds are listed in the  
23 stipulation, several insurance companies, American General  
24 life, AXA Equitable, John Hancock, Lincoln National, Pruco  
25 Life, Security Mutual, Sun Life Financial, and Union Central

DA1JBIN1

Trial

1 Life, those eight companies paid out commissions, and the  
2 amounts of the commissions that they paid in connection with  
3 those policies are listed in this government exhibit, and the  
4 payees, the people who got the money, are listed and the  
5 commissions were paid to one of the following:

6 R. Bindow Plans & Concepts, CPS Insurance Services,  
7 Inc, Crump Life Insurance Services, Denise Bindow Koslowsky,  
8 Glenn Bindow, Madison Brokerage Corporation.

9 As you will see, eight insurance companies paid a  
10 number of commissions to one of those people or entities for  
11 policies that are listed in this stipulation. The parties will  
12 argue from that. I have accepted this stipulation, 5006 into  
13 evidence.

14 (Continued on next page)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DALLBIN2

Trial

1 THE COURT: So we also were able to introduce a last  
2 batch of documents, the last batch of documents that the  
3 government wanted to introduce into evidence, and we got that  
4 done this morning.

5 And, Ms. McCallum, are you going to make some  
6 presentations to the jury from those documents?

7 MS. McCALLUM: Yes, your Honor. At this time we are  
8 going to just publish select documents to the jury.

9 THE COURT: Okay. The government is going to show you  
10 some of those documents that came into evidence. It's about 40  
11 or 50 of them came into evidence.

12 Could we have them by number, please.

13 MS. CHOI: Government Exhibit 1670.

14 THE COURT: And please give the jurors time to read  
15 it.

16 MS. CHOI: Government 1677.

17 Government Exhibit 1687.

18 Government Exhibit 1654.

19 Government Exhibit 1698.

20 Government Exhibit 1654.

21 Government Exhibit 2670.

22 Government Exhibit 1642.

23 Government Exhibit 2659.

24 Government Exhibit 2659A.

25 Government Exhibit 5004.

DA11BIN2

Trial

1 MS. McCALLUM: The government rests, your Honor.

2 THE COURT: Ladies and gentlemen, the government rests  
3 are magic words. The government is advising us that it has now  
4 placed before you all of the evidence from which the government  
5 will argue that it has proved the defendants' guilt of the  
6 charged crime beyond a reasonable doubt.

7 Nothing has changed. The presumption of innocence  
8 continues to cloak the defendants. We have not reached the end  
9 of either the presentation of evidence or the arguments of  
10 counsel. You haven't been instructed on the law yet. So  
11 remember the defendants are and continue to be presumed  
12 innocent, but the government has finished putting in its case.

13 So I'm actually doing this the way it's supposed to be  
14 done which is to tell you that I am now required to do some  
15 things outside of your presence with the lawyers. And I'm  
16 going to ask you to be back at 1:30 and we will get started  
17 with the afternoon's proceedings. I don't know how long  
18 they're going to be. I have no way of knowing.

19 And as you will recall, I told the government it had  
20 to put on a case. I will ask the defense if it wants to put on  
21 a case. The defense has nothing to prove because the  
22 defendants are presumed innocent.

23 One of the things I'm going to find out while you're  
24 at lunch is what's going to happen in terms of presentations,  
25 if any, on behalf of the defense. I remind you that if the

DALLBIN2

Trial

1 defense decides or any of the defendants decide to put on any  
2 evidence, they are not thereby assuming the burden of proof.  
3 We presume that they are innocent. The government has to  
4 overcome that presumption.

5 So have some lunch.

6 I just wanted to address one other thing because this  
7 is, as you all know, sort of a weird and momentous day. The  
8 government has shut down for business except that in this  
9 building it has not for two reasons. First of all, the courts  
10 actually have a source of funding outside of revenues raised  
11 through the taxes and appropriated by Congress. We collect  
12 fees from people who file things. And so we're going to use up  
13 that money to keep going for as long as we can. Second, when  
14 that stops, we -- and that, by the way, is enough business days  
15 that we'll be done, okay.

16 And if and when that money should run out, we are by  
17 law required to keep essential services going. We're in the  
18 middle of a criminal trial. That is an essential service  
19 provided for by the Constitution of the United States. So we  
20 will not be shutting down this operation until we're done, all  
21 right. So I just didn't want anybody to have any doubt about  
22 that or any questions about that. We're just on go. We're  
23 just on go. All right.

24 I'm really sorry that I didn't manage to get this  
25 arranged so as to minimize the wasting of your time, but enjoy

DA1LBIN2

Trial

1 the beautiful sunshine. I'll see you. Don't discuss the case.  
2 Keep an open mind.

3 (Jury not present)

4 THE COURT: Okay. Now.

5 MR. ABRAMOWITZ: May I, your Honor?

6 THE COURT: I'm waiting for you.

7 MR. ABRAMOWITZ: I thought you were doing something  
8 else.

9 THE COURT: No, I'm setting up to take notes.

10 MR. ABRAMOWITZ: Just for a little background, your  
11 Honor, as to how we discovered these exhibits that we intend to  
12 show you and hopefully the jury.

13 Your Honor will recall from the pretrial applications  
14 concerning subpoenas first that as early as April 2010, the  
15 government issued -- that's over three years ago -- the  
16 government issued a grand jury subpoena calling for files  
17 relating to all records concerning life insurance associated  
18 with Michael Binday and all records concerning life insurance  
19 policies for specifically identified insureds, and that was one  
20 that was specifically sent to Lincoln and other insurance  
21 companies.

22 Your Honor will recall that there was an issue as to  
23 whether they actually enforced that contract -- that subpoena  
24 because the documents we discovered were not furnished to us.  
25 We came in the case in April of 2013, and we undertook an

DA1LBIN2

Trial

1 effort to analyze the content of the production. And after two  
2 months of that, we discovered that there were defects in the  
3 production for those insurance policies and that led to our  
4 application for the subpoena that your Honor eventually  
5 granted.

6 Now, your Honor's order in July and August had an  
7 effect. We did get for the first time a huge volume of  
8 documents that could have been and in many respects have been  
9 in the government's possession years ago and even before the  
10 indictment, which is even more relevant.

11 We have undertaken -- and this is on behalf of all the  
12 defendants -- we have undertaken to review 44 of those files.  
13 There remain as of today 62 additional files that we have not  
14 yet had an opportunity to review. And these documents came  
15 from six insurers: American General, John Hancock, Lincoln  
16 Financial, Security Mutual, Sun Life, Union Central, and  
17 Prudential.

18 And in analyzing them -- we have been analyzing these  
19 on a full-time basis since mid-August -- we have discovered  
20 that 35 of the 44 files had substantial underwriting issues  
21 akin to those which we will sample in this presentation.

22 Now, we have taken and propose to prove a sample of 11  
23 files from four insurers: American General, Lincoln, Union  
24 Central, and Sun Life. Within those 11, five files relate to  
25 the witnesses in this case: three of them from James Farrell,

DA1LBIN2

Trial

1 one from Maria Ramos, and one from Silas Griffin. And I  
2 propose to present some of this to you so you get the drift and  
3 you'll see what we intend to prove from these exhibits.

4 Can we put on -- we have a hard copy of the excerpts  
5 we're going to show you, but we intend to put it on the screen.  
6 So if you want a hard copy, we'll be glad to give it to you.

7 But let's look at Defendant's Exhibit 3352. And let  
8 us go to American General page 14367. And can we blow up the  
9 bottom portion of the letter.

10 These are again, your Honor, from the underwriter's  
11 files. We have a letter from an attorney stating that he was  
12 helping her with some estate issues. Also provided break down  
13 of NW but also -- which I would interpret as net worth -- but  
14 also stated he did not audit these figures and they are being  
15 regurgitated by the proposed insured. Underwriter to CC to GA,  
16 please note, the letter from the lawyer does not fulfill the  
17 third party financial requirement as he states in the body of  
18 the letter that these figures were supplied by the client  
19 herself. We will need verification of finances from a third  
20 party (CPA? Tax preparer? Accountant?).

21 We next go to 3271, which is an application from Myra  
22 Davis also to American General.

23 And, by the way, every one of these policies, the  
24 policy was granted, your Honor, and we would intend to show  
25 that.



DA1LBIN2

Trial

1 DX3271, can we go to page 001 --

2 THE COURT: This the same policy we're going to  
3 talking about?

4 MR. ABRAMOWITZ: This is a different one.

5 THE COURT: So do we know what happened in response to  
6 the thing that says we need to hear from the accountant, we  
7 need to hear -- do we know what happened?

8 MR. ABRAMOWITZ: It was issued. The policy was issued  
9 without it.

10 THE COURT: Do we know --

11 MR. ABRAMOWITZ: Nothing.

12 THE COURT: Do we know that it was issued without that  
13 directive we need to hear from the accountant? Do we know it  
14 was issued without any information from the accountant?

15 MR. ABRAMOWITZ: Yes.

16 THE COURT: How do we know that?

17 MR. ABRAMOWITZ: It's not in the file.

18 Let me introduce Ms. Juteau, who would be the one  
19 testifying about this.

20 MS. JUTEAU: In addition, in this particular case,  
21 several days later there's a subsequent underwriter note that  
22 says we're fine with the attorney's letter and the policy is  
23 issued.

24 MR. ABRAMOWITZ: And we will show that to the jury.  
25 Your Honor, I'm shortening this for you just to get the idea.

DALLBIN2

Trial

1 THE COURT: But I'm going to ask questions.

2 MR. ABRAMOWITZ: You should.

3 THE COURT: Because underwriting -- do we know if it's  
4 a STOLI policy? Do we know if it's a STOLI policy, was that a  
5 policy that was intended to be sold? Was it sold?

6 MR. ABRAMOWITZ: Indeed, it was a Binday STOLI policy.

7 THE COURT: Okay.

8 MR. ABRAMOWITZ: And we will show in all of the  
9 examples I'm about to give you, we will show that they knew it  
10 was a STOLI policy and they granted it anyway.

11 THE COURT: And how did they know it was a STOLI  
12 policy?

13 MR. ABRAMOWITZ: Because the net worth didn't match.  
14 You'll see because --

15 THE COURT: I'm sorry. I'm missing it. I really need  
16 to understand. Okay. The net worth didn't match. What do you  
17 mean?

18 MR. ABRAMOWITZ: Do you want to show more.

19 THE COURT: I need to understand why this is. So they  
20 said they wanted third party verification, and they issued the  
21 policy without getting third party verification. And how did  
22 they know it was a STOLI policy that they were issuing?

23 MR. ABRAMOWITZ: Age -- all of the factor -- came from  
24 Binday, the age of the woman and the net worth was high and  
25 all -- they had all of the hallmarks of a STOLI policy.

DALLBIN2

Trial

1 MS. McCALLUM: Your Honor, I believe this exhibit does  
2 not relate to the one about whom you're talking.

3 MR. ABRAMOWITZ: Your Honor, we really could run  
4 through the entire testimony if you want. I'm trying -- let me  
5 just try to explain in a proffer.

6 The proffer will show that the kinds of letters that  
7 the government says defrauded the insurance companies they saw  
8 and in other situations understood that they were not getting  
9 audited statements. These are older applicants, 70 or older,  
10 these are high net worth individuals asking for high face value  
11 policies.

12 THE COURT: You can go as fast as you want. I just  
13 get to ask questions.

14 MR. ABRAMOWITZ: I know, your Honor.

15 THE COURT: I can't rule without understanding.

16 MR. ABRAMOWITZ: I think that the way to rule is to  
17 hear the whole body of it because it's the weight of it that's  
18 significant. It's the fact that there were 35 out of 44 STOLI  
19 policies, what we would argue are STOLI policies, that they  
20 could clearly have seen were STOLI policies and they let them  
21 go and it's not negligence. This is wide open. They see that  
22 letter and they say this letter is nonsense and it's not  
23 sufficient to establish the net worth and then that policy gets  
24 granted.

25 Then Myra Davis, which would be Exhibit 3271. Please

DA1LBIN2

Trial

1 go to 016577. Right away they notice it's a premium financed  
2 case. We heard some very pious testimony that they didn't want  
3 premium financed cases because that was a STOLI red flag. And  
4 we -- they noticed there was a premium financed case right away  
5 and it said yes.

6 Now, go to, please, 0016557. Please blow up the  
7 highlighted portion. Now, here is a underwriter who did some  
8 of the things that I suggested that the insurance companies  
9 didn't require.

10 Financially I did a zillow.com check on the two  
11 residences mentioned in the inspection report. The address in  
12 Boynton Beach does not exist, but neighborhood houses only in  
13 the upper 300,000 to low 400,000 range. The second address is  
14 in Melville, New York, is only worth 773,000. This does not  
15 come close to their admitted real estate holdings that they  
16 mentioned on the inspection report. She says she has other  
17 real estate holdings. Should we pursue or do you feel okay as  
18 it is? Jerry.

19 That is an example where they actually know that they  
20 have gotten a false financial statement and they went ahead and  
21 issued the policy.

22 Please go to 0016540. Looking at the picture on  
23 zillow, it appears to be a condo complex, which I doubt is in  
24 the \$3 million range. Secondly, page 1 lists a different owner  
25 of the Boynton Beach, Florida residence, but lists her as the

DA1LBIN2

Trial

1 owner on page 2.

2 Again, another indication that they discovered that  
3 there was false information on the financial -- on the  
4 application.

5 Please go to 0016539. "So adding it all up I get a  
6 little over one to \$1.5 million in real estate holdings and not  
7 much else. So I don't see the financial justification. Her  
8 CPA didn't verify the holdings so that doesn't help us. So  
9 whether they need to show stockbroker's statements showing the  
10 7.3 million in holdings along with real estate holdings, or I  
11 wouldn't issue since the evidence we have isn't holding up to  
12 the amount she is telling us. Hope this helps."

13 Please go to 0016522. These are -- highlighted  
14 portion -- these are certificates of ownership for three  
15 cooperative apartments in New York, two in the Bronx, one in  
16 Great Neck. I zillowed all three. The two in the Bronx  
17 probably go for 250,000 apiece, and that is what comparable  
18 apartments appear to be going for in that building. The other  
19 apartment in Great Neck is not found on zillow.

20 Thoughts. Do these certificates distributed in 1985  
21 and 1986 prove current ownership? They are not listed on the  
22 e-search. This just appears to be another agency trying to  
23 overinsure an elderly life. If these properties are being used  
24 to generate rental income, I would presume they would be listed  
25 on her tax returns with addresses and income generated. I had

DA1LBIN2

Trial

1 already increased this to \$5 million. Appreciate your input as  
2 to how to handle this. And the next thing we know they granted  
3 the policy.

4 MS. McCALLUM: Your Honor, may I clarify, this is  
5 relating to Myra Davis still?

6 MR. ABRAMOWITZ: This is relating to Myra Davis, yes.  
7 Now going to Defendant's Exhibit 3038, which relates  
8 to James Farrell, Lincoln National. Can we go to 33830. These  
9 are again underwriting notes.

10 THE COURT: Are we now off Myra?

11 MR. ABRAMOWITZ: Yes.

12 THE COURT: Policy issued.

13 MR. ABRAMOWITZ: Policy has been issued in all of  
14 these, your Honor.

15 THE COURT: Okay.

16 MR. ABRAMOWITZ: Just so you know. And if we get to  
17 the testimony, that will be part of it.

18 This is for James Farrell.

19 THE COURT: And this is -- a document number, please.

20 MR. ABRAMOWITZ: Document.

21 THE COURT: Defense.

22 MR. ABRAMOWITZ: Defendant's Exhibit 3038.

23 THE COURT: 3038.

24 MR. ABRAMOWITZ: And we're on page 33830. "Worried  
25 about income replacement but the majority of income is

DALLBIN2

Trial

1 unearned. The trust was set up at 5/07, same address as  
2 applicant, no planning done? The illustration has a first year  
3 premium of 170,000 and 154,000. What's the plan here?

4 "No in force insurance and now at 72 he is convinced  
5 to purchase a \$4 million policy with \$4.5 million net worth at  
6 154,000?"

7 Again, indicating that they were suspicious of the  
8 application that was sent in.

9 Same page, problem is finances. Case is indicated as  
10 not being premium financed. Has no formal estate plan, and  
11 balking regarding getting an accountant's statement. Should I  
12 let this go with an IOLI amendment? For \$4 million of  
13 insurance and paying 170,000, shouldn't he have some formal  
14 estate plan?

15 The short answer here is, your Honor, they issued, as  
16 Mr. Farrell testified, they issued the policy despite the red  
17 flags that are highlighted in the underwriting notes.

18 Four. Defendant's Exhibit 3101, which is Silas  
19 Griffin, also a witness in this case. Go to page 33957.

20 THE COURT: Let me just ask a question. Does the  
21 government contend that information from the underwriting files  
22 relating to the very policies that were testified about on its  
23 case should not be admitted into evidence on the defense case?

24 MS. McCALLUM: Yes, your Honor, for all the reasons we  
25 spelled out in our motions in limine. Negligence is not a

DALLBIN2

Trial

1 defense to the charges here. And this is -- I will just  
2 note --

3 THE COURT: I hate to tell you, anything that is  
4 coming from a file from a policy that was testified to on your  
5 case is coming in. It's coming in.

6 MS. McCALLUM: Your Honor, that's not what the Court's  
7 ruling was.

8 THE COURT: My ruling today is that it's coming in.  
9 You can argue that it's simply negligence but it's coming in.  
10 You got information about those policies. You got information  
11 about those policies in front of the jury.

12 MS. McCALLUM: These are internal underwriting notes  
13 to the --

14 THE COURT: Ms. McCallum, let me tell you something.  
15 Let me tell you something.

16 MS. McCALLUM: I understand the Court's ruling.

17 THE COURT: You don't because I want to make something  
18 very clear. The government made its usual close to the vest,  
19 cards to the chest, in a vacuum in limine motion to keep out  
20 evidence. The government did not give me the underwriting  
21 files and all of the -- and perhaps I should have asked for  
22 them; I didn't think to ask for them -- the government did not  
23 give me all of the evidence relating to those particular  
24 policies. Nor did the government say to me -- I don't really  
25 remember hearing it or reading it -- that it is the



DALLBIN2

Trial

1 government's position that Mr. Farrell's policy was issued as a  
2 result of negligence by somebody in the insurance company  
3 because then we could have talked about something that was  
4 concrete. We were talking in a vacuum about stuff that was  
5 amorphous.

6 This is concrete. The government chose, the  
7 government chose to put some information about Mr. Farrell's  
8 policy in front of the jury, some information, including how  
9 it -- the fact that it got issued. Well, as far as I'm  
10 concerned, all information about Mr. Farrell's policy, some of  
11 which the jury knows, is fair game.

12 MS. McCALLUM: Your Honor, I will just note that the  
13 first two policies you just heard about relating to Myra Davis  
14 and Eva Hearttimer, those are not cases we proved at the trial.

15 THE COURT: I haven't said anything about them.

16 MS. McCALLUM: Okay.

17 THE COURT: It was Mr. Farrell that I stopped and  
18 asked about Mr. Farrell because I listened to Mr. Farrell.

19 MS. McCALLUM: Your Honor, I understand. I just want  
20 to note for the record this Mr. Farrell, we will have a  
21 rebuttal case on this.

22 THE COURT: That's fine.

23 MS. McCALLUM: All of this is very misleading.

24 THE COURT: There will be an issue about whether you  
25 can have a rebuttal case or should have put it on in the case

DA1LBIN2

Trial

1 in chief. You may well have a rebuttal case. That's okay.  
2 But I have to tell you right now the jury has only part of the  
3 story about why -- was it Lincoln that issued the policy to  
4 Mr. Farrell -- about why Lincoln issued the policy to  
5 Mr. Farrell. And it gets to hear the whole story.

6 MR. ABRAMOWITZ: Your Honor, aside from Mr. Farrell  
7 and Mr. Griffin and the others, this -- I dare say the  
8 government may stand up now not having seen all this and say  
9 they're going to say this is negligence. This is not  
10 negligence. IOLI detection doesn't mean negligence. It means  
11 to me we see it, we know it, we're disregarding our policies  
12 and we're going to issue it. Negligence --

13 THE COURT: I think you've got a great argument,  
14 Mr. Abramowitz. I couldn't possibly keep it out.

15 MR. ABRAMOWITZ: And I'm not going to argue, I'm not  
16 going to offer anything where they made addition errors or  
17 things like that. IOLI detection is not something that is  
18 negligence in my view. And then if we can blow up the rest of  
19 that. First above that.

20 Another red flag, multiple applications exist.

21 THE COURT: Whose policy is this?

22 MR. ABRAMOWITZ: This is Farrell.

23 THE COURT: Same --

24 MR. ABRAMOWITZ: Sorry. Is this Griffin? This is  
25 Mr. Griffin. This is 3101.

DALLBIN2

Trial

1 THE COURT: That's Mr. Griffin?

2 MR. ABRAMOWITZ: Yes.

3 THE COURT: Lovely man.

4 MR. ABRAMOWITZ: Lovely man. I totally agree.

5 Multiple applications exist for the insured. Review  
6 case for possible nonrecourse premium financing.

7 Make it a little bigger.

8 No MIB hits, priors as noted, no coverage in force.

9 No financials on the application. Await medicals.

10 Another notice that it exceeded financial guidelines,  
11 retention amount was exceeded.

12 Can we go to Exhibit 3108. I'm sorry, that's another.

13 THE COURT: Are we still on Mr. Griffin's policy?

14 MR. ABRAMOWITZ: No. We're now --

15 THE COURT: I can tell you 3038 is coming in and 3101  
16 is coming in.

17 MR. ABRAMOWITZ: Your Honor, all of these --

18 THE COURT: Don't talk all of these. I don't do all  
19 of these. I do individual documents, okay. And I can -- but  
20 as a group I will tell you that if these kinds of entries are  
21 found in the underwriting files of policies that the jury heard  
22 about on the government's case, they're going to see the whole  
23 megillah, okay, they are. They just are.

24 MR. ABRAMOWITZ: And we'll next go to Exhibit 3108,  
25 Eva Hearttimer at Lincoln National and we'll go to page 33624.

DALLBIN2

Trial

1 THE COURT: This is 3108. And this is someone we  
2 haven't heard about?

3 MS. McCALLUM: Have not heard about.

4 MR. ABRAMOWITZ: 33624. IOLI -- this is also Lincoln,  
5 your Honor, and the point is that these are Lincoln policies  
6 where we had a witness, Mr. Burns, who said we have these  
7 policies. We don't want STOLI. And they have all the  
8 guidelines and now what do we see? IOLI detection.

9 Owner state of residence is different from the insured  
10 state of residence. Review case for possible nonrecourse  
11 premium financing.

12 Now we can go another Lincoln, Defendant's  
13 Exhibit 3062. This is Maria Ramos. This is somebody --

14 THE COURT: She was here.

15 MR. ABRAMOWITZ: -- was here. IOLI -- excuse me, page  
16 091653 -- IOLI, multiple applications exist for the insured.  
17 Review case for possible nonrecourse premium financing.

18 Next go to Defendant's Exhibit 3159, page 50824.  
19 Another Lincoln policy, Tomasa Contreras. Could we look at --  
20 this is part of the application where they answered the  
21 question: Have you had any discussions about the eventual sale  
22 of new life insurance, including any indirect sale, etc., and  
23 the insured says yes. And he says while -- the applicant,  
24 excuse me. While there are no plans to sell this policy at  
25 this time or in the future, we have discussed the secondary

DALLBIN2

Trial

1 market.

2 And then let's compare that to Defendant's  
3 Exhibit 3162.

4 MS. McCALLUM: What was this exhibit?

5 MR. ABRAMOWITZ: That's 3159. And let's compare it to  
6 3162 where the same question, the same applicant has answered  
7 the answer to that same question is no and it's in the same  
8 application. Now let's compare -- that's for that exhibit. So  
9 on the face of it, they have two inconsistent red flag IOLI  
10 answers.

11 Let's go to Defendant's Exhibit 3043 at page 36760.

12 THE COURT: Who is the insured?

13 MR. ABRAMOWITZ: Alma Lapp, another Lincoln National  
14 applicant from Mr. Bindow's office. Thirty -- I want to  
15 compare Exhibits 3043 and 3044 at pages 36924. And let's look  
16 at -- these are in the same underwriting file. On the left  
17 side it says cash in banks, one million four.

18 Let's do it this way. Let's look at what do they list  
19 for real estate on the left, 550,000. What does 3044 list for  
20 real estate, 400,000. Defendant's Exhibit 3043 lists for  
21 liabilities, zero. Defendant's Exhibit 3044 lists for  
22 liabilities, 259,111. Defendant's Exhibit 3043 lists for  
23 personal property, \$1 million. 3044 lists for personal  
24 property, \$500,000. 3043 lists for cash, 1,400,000. And  
25 Defendant's Exhibit 3044 lists for cash 550,000. So in the

DALLBIN2

Trial

1 same file they have obviously inconsistent financial statements  
2 for people in STOLI red flag zone.

3 Let's look at Exhibit 3045, another Alma Lapp  
4 application. We'll go to page 33701, another Lincoln National  
5 policy. Also coming up as an IOLI. We need to question for  
6 premium financing.

7 Let's go to page 33705. Agree okay for 2.5 million.  
8 Would obtain the agent IOLI certification form.

9 Let's go to Exhibit 3301.

10 THE COURT: Hang on, please. What is that?

11 MR. ABRAMOWITZ: That indicates that they knew it was  
12 IOLI. All they wanted to do was get a certification form to  
13 keep in the files. And we would argue that that indicates that  
14 they knew they were getting STOLI and they let it go. The  
15 government can argue it's negligence, it's this and it's that.  
16 We have a right to argue that, first of all, with every one of  
17 these Lincoln policies, they knew what they were getting  
18 despite the financial -- despite the guidelines that were  
19 issued from the top.

20 Let's go to Defendant's Exhibit 3301, another James  
21 Farrell at Sun Life. At page 62, we go to the highlighted  
22 language, although I do not find language that indicates a  
23 relationship to the secondary market, the trust is a bit  
24 sparse. Is this case a premium financed case, they ask. And  
25 that again is one of the red flags of IOLI and should have put

DA1LBIN2

Trial

1 the company on notice that they were -- they should not have  
2 issued that policy if they didn't want it.

3 We go to page 63. The amount of shopping still is of  
4 concern to me. The trust seems vague. The trustee is a little  
5 atypical. I am still somewhat uncomfortable with this case and  
6 would use a very specific amendment in relation to the total  
7 line and dates last seen by the MDs.

8 Now, your Honor, these are only samples. We have, we  
9 have others from the insurance files of Mr. Binday which the  
10 government has stipulated should be introduced into evidence  
11 and they are --

12 THE COURT: No.

13 MR. ABRAMOWITZ: Files.

14 MR. FEINGOLD: That's not the stipulation.

15 THE COURT: The stipulation was that they're business  
16 records.

17 MR. ABRAMOWITZ: Yes, I'm sorry. They're business  
18 records from Mr. Binday and they come from Mr. Binday's files  
19 and they deal with the companies that --

20 THE COURT: Sit down, please.

21 MR. FEINGOLD: We did not stipulate they're business  
22 records, your Honor.

23 THE COURT: Fine.

24 MR. ABRAMOWITZ: They are insurance applications that  
25 are on file with the insurance companies that you did stipulate

DA1LBIN2

Trial

1 were part of the file.

2 THE COURT: We'll pull the stipulation out. I'm sure,  
3 I'm relatively certain there is a witness who can be called who  
4 is not Mr. Binday who could qualify them as business records.

5 MR. ABRAMOWITZ: The insurance files were stipulated  
6 as business records.

7 THE COURT: We'll see. Give me the stipulation. But  
8 not this minute.

9 MR. ABRAMOWITZ: Not this minute.

10 THE COURT: I want you to finish your thought.

11 MR. ABRAMOWITZ: Your Honor, I have given you a sample  
12 of what -- I don't -- it's a two-hour presentation, I think.  
13 And the way I propose to do it is to have Ms. Juteau take the  
14 stand and I will simply go through for these applicants and  
15 others situations like this.

16 The government is certainly free to say this is  
17 negligence. I say that 35 out of 44 with indications that they  
18 were not fooled at all, not deceived, goes right to the heart  
19 of our defense. And it goes right to the heart of our defense  
20 that the procedures that when Mr. Burns and Mr. Avery were  
21 here, they lied on the stand. They lied when they said they  
22 would -- the process enhancements. The process enhancements  
23 was to raise the price to stop STOLI. So that encourages the  
24 applications to be granted, especially when they know they're  
25 IOLI. If they know that they're STOLI and they know they are



DALLBIN2

Trial

1 IOLI, they are not being deceived. And that is --

2 THE COURT: I have to agree that if they know they are  
3 STOLI, they are not being deceived.

4 MR. ABRAMOWITZ: And we have 35 examples out of the  
5 ones that we've looked at from insurance -- from Mr. Bindow's  
6 insurance files and the insurance companies that are alleged to  
7 be the victims here that indicate that they knew.

8 THE COURT: You understand that I'm particularly  
9 interested in the ones that the government has introduced  
10 evidence of on its case in chief because the government isn't  
11 proving and isn't charged with proving something grand and  
12 amorphous. It's charged with proving particular incidents of  
13 fraud.

14 MR. ABRAMOWITZ: But no -- they've gone much broader.  
15 There are a thousand exhibits here about insurance policies,  
16 about people that you haven't heard from. And there are  
17 insurance companies that have gone on the stand and said how  
18 they really don't want this. They don't want it.

19 THE COURT: I listened to them all.

20 MR. ABRAMOWITZ: They don't want it. And I want to  
21 show that they may say they didn't want it, but they got it.  
22 And these are employees --

23 THE COURT: Not that they got it. You want to show  
24 that they knowingly took it.

25 MR. ABRAMOWITZ: Correct. And I think I'm entitled to

DALLBIN2

Trial

1 do that. The government can say it's negligence. The  
2 government can say whatever they want to say. But the fact of  
3 the matter is when a good portion of their case is that these  
4 accountant's letters and these lawyer's letters, they know that  
5 they said we didn't verify anything. And when they say we want  
6 to have a certification from Mr. Binday that this is not IOLI,  
7 they knew it was IOLI and all they wanted to do was put paper  
8 in the file. And that's exactly what this case is about.

9 And we feel that this is our defense and we really  
10 feel we need to be able to present this to the jury. The jury  
11 can reject it. The government can say they lied, they lied,  
12 they lied, they lied. We can say they weren't deceived at all.

13 One minute, your Honor.

14 And Mr. Stavis informs me and reminds me that we have  
15 a constitutional right to present our defense. This is our  
16 defense.

17 THE COURT: I'm aware of that.

18 MR. ABRAMOWITZ: I know you are.

19 THE COURT: They taught me that in law school.

20 MR. ABRAMOWITZ: I went to law school so long ago I  
21 don't know if the Constitution --

22 THE COURT: We both did. It was still in force then.

23 Ms. McCallum, Mr. Feingold, somebody.

24 MS. MCCALLUM: Your Honor, you just saw presumably  
25 what is the best of and --

DALLBIN2

Trial

1 MR. ABRAMOWITZ: There's more.

2 MS. McCALLUM: For the three -- there were only three  
3 insureds there who were talked about during this trial.

4 THE COURT: Is there any evidence about any of the  
5 other insureds in the thousands of documents that have been  
6 admitted but that were not discussed on the witness stand? In  
7 other words, is there a Government Exhibit in evidence about  
8 Ms. Lapp, is there a Government Exhibit in evidence about  
9 Mr. Contreras?

10 MS. McCALLUM: No. There is an email I believe that  
11 references Alma Lapp.

12 THE COURT: Myra Davis?

13 MS. McCALLUM: The government in selecting its  
14 exhibits for this trial -- and there are a lot of them, but  
15 they relate to particular insureds. They relate to a list of  
16 about 12 insureds. And the exhibit list is actually broken  
17 down by insured. And you heard from some of those insureds;  
18 you did not hear from others. But the government -- they are  
19 part of the government's case. Ms. Hearttimer --

20 THE COURT: Those insureds are whom? Read me the  
21 list.

22 MS. McCALLUM: They are Florra Adler, Robert Katz,  
23 Helen Carufe.

24 THE COURT: Ellen?

25 MS. McCALLUM: Helen Carufe, C-A-R-U-F-E, James

DA1LBIN2

Trial

1 Farrell, who has a lot of documents.

2 THE COURT: Yes, he does. Had a lot of policies, as I  
3 recall.

4 MS. McCALLUM: Yes. Martha Espinal. Also has a lot  
5 of documents. Silas Griffin, Opal Headrick.

6 THE COURT: Opal Headrick.

7 MS. McCALLUM: H-E-A-D-R-I-C-K. Oswald Heaton, Hanni  
8 Lennard, Mary Pernice, who had no policies issued, Maria Ramos,  
9 Doris Riviere, Lillian Robinson.

10 MR. ABRAMOWITZ: Your Honor, they are charged with  
11 defrauding insurance companies. I intend to show -- they may  
12 have picked what they wanted to pick, and if I were a little  
13 more suspicious, I would suggest they didn't pick the ones that  
14 we have just been talking about, but these are Binday policies  
15 going to the same insurance companies in which there's a broad  
16 conspiracy charged for 13, 13 insured companies in the  
17 indictment. They started with ten or whatever, they're down to  
18 two.

19 We want to produce, we want to show that the insurance  
20 companies knew, not any particular insured. They knew by the  
21 guidelines that they set -- 70 years old, over \$4 million,  
22 \$3 million policies -- that they wanted these policies.

23 And the government is certainly free to argue that we  
24 pulled the wool over their eyes, that these guys were just  
25 being negligent. I dare say when they see it all, they'll have

DALLBIN2

Trial

1 to come up with a different argument. This is not negligence.  
2 And it's not so much the individual insured, it's the  
3 companies, the ones that are receiving.

4 THE COURT: Could you -- would you mind sitting down.

5 MR. ABRAMOWITZ: No.

6 THE COURT: Thank you. Because Ms. McCallum actually  
7 had the floor.

8 MR. ABRAMOWITZ: She sat down, I thought.

9 THE COURT: She sat down because you stood up.

10 MR. ABRAMOWITZ: She didn't see me stand up.

11 MS. McCALLUM: I did.

12 THE COURT: She sensed you behind her.

13 MR. ABRAMOWITZ: I see. Okay.

14 MS. McCALLUM: Your Honor, there's a reason the  
15 defendants have selected insureds that were not actually  
16 testified about during the trial. They have tried to cherry  
17 pick from the underwriting files of select insureds that they  
18 know the jury hasn't heard about yet.

19 I understand the Court's ruling with respect to the  
20 particular insureds who were testifying here.

21 THE COURT: Or for whom the government has exhibits in  
22 evidence.

23 MS. McCALLUM: That's fine, your Honor. I understand  
24 the Court's ruling.

25 THE COURT: It's fine. It's not fine -- there's a

DALLBIN2

Trial

1 separate issue about how the stuff gets into evidence, but  
2 that's a separate question.

3 MS. McCALLUM: Your Honor, I mean the parties have,  
4 you know, some agreement with respect to some of these records  
5 that there's not going to be objections on hearsay or  
6 foundation grounds, but not with respect to the hundreds of  
7 exhibits that were produced over the weekend relating to all  
8 sorts of insureds about whom the government was not presenting  
9 evidence during its case in chief. And, again, these are  
10 extraordinarily misleading excerpts that you just saw.

11 THE COURT: Well, excuse me.

12 MS. McCALLUM: I just want to give the Court some  
13 context.

14 THE COURT: I am sure you think they are  
15 extraordinarily misleading excerpts. The problem is that  
16 that's for the jury to decide whether they are extraordinarily  
17 misleading.

18 When I tell the jury what the definition of negligence  
19 is, as I will, it will probably be argued that if they said  
20 this looks like an IOLI policy to me, we're not talking  
21 negligence.

22 MS. McCALLUM: Your Honor, that's why they're  
23 misleading.

24 THE COURT: Yes, of course.

25 MS. McCALLUM: I just want to just have the Court

DALBIN2

Trial

1 understand what is really happening here.

2 THE COURT: I do understand what's really happening  
3 here, Ms. McCallum. There's a defense in this case.

4 MS. McCALLUM: I understand, your Honor. But to bring  
5 in all of these files about people whom the jury has not heard  
6 about and about whom the government has not presented any  
7 evidence.

8 THE COURT: I'm not sure we can do that.

9 MR. ABRAMOWITZ: Your Honor, please. They've heard  
10 the insurance companies. Forget the individual insured. They  
11 heard that Mr. Binday and the other defendants are charged with  
12 a conspiracy of putting STOLI documents in. We are not limited  
13 to their exhibits on our defense case. We have a defense case.

14 THE COURT: I hear you. I hear you.

15 MR. ABRAMOWITZ: Excuse me, your Honor.

16 THE COURT: My biggest problem with your presentation,  
17 Mr. Abramowitz, is not that you have a defense case. It's how  
18 you propose to put it in.

19 MR. ABRAMOWITZ: I propose to put it in by files from  
20 the insurance companies who are involved in this case, who are  
21 alleged to be the victims in this case. And how can they say  
22 that with one they pick it got through, but then the 20 that go  
23 to the same company and it's the same alleged conduct that we  
24 say is perfectly legitimate conduct and they say is perfectly  
25 criminal conduct, we're allowed to show that they knew what

DA1LBIN2

Trial

1 they were getting from Mr. Bindow and Mr. Kergil and  
2 Mr. Resnick.

3 And they can argue that, oh, it slipped through, it  
4 slipped through. I dare say when the whole presentation is  
5 made they cannot make that argument, as your Honor just  
6 indicated. They will not be able to make that argument.

7 They can argue that they relied on what Mr. Bindow  
8 said, but we certainly are free to argue that could not have  
9 relied on what he said and could not have relied on those  
10 nonsense accountant letters, they were just paper. Just paper.  
11 They wanted the IOLI, STOLI business until they didn't want to  
12 pay it. That's the case. They wanted it all those years the  
13 hedge funds were paying all those premiums. They wanted the  
14 business. They closed their eyes, they consciously avoided  
15 finding out the truth about these IOLI policies.

16 And we are entitled to show that under the DeMatto  
17 case. And not that they didn't bring out these individual  
18 applicants -- they're all Bindow applicants, they're all STOLI  
19 applicants. It's the insurance companies that are supposedly  
20 the victims here, and we want to show that they were not  
21 victimized.

22 THE COURT: Okay. Let's start with the stipulation.  
23 Where is the stipulation? Because I'll bet that the  
24 stipulation gets in records relating to Adler, Katz, Carufe,  
25 Farrell, Espinal, Griffin, Headrick, Heaton, Lennard, Pernice,



DALLBIN2

Trial

1 Ramos, Riviere, and Robinson. Am I right?

2 MS. McCALLUM: No, it doesn't get in any documents,  
3 your Honor. It's a stipulation that the government -- that  
4 both parties will not contest on hearsay or foundation grounds  
5 certain select exhibits that are appended to the stipulation.

6 MR. FISCHER: Your Honor, this is the nonhearsay.

7 THE COURT: Could I have the stipulation? What's the  
8 number?

9 MR. FISCHER: Government Exhibit 5001.

10 THE COURT: Government Exhibit 5001.

11 Jimmy, I need a copy of it. It was admitted into  
12 evidence.

13 THE DEPUTY CLERK: They have their slips back.

14 MR. FISCHER: And, your Honor, if you look at the top  
15 portion of Defendant's Exhibit, this is a nonhearsay  
16 foundation. The parties will not object on nonhearsay grounds.  
17 Defendant's Exhibit 3001 through 3076 are part of this  
18 presentation. They are documents, your Honor, that come  
19 directly from the insured's policy file that were produced by  
20 the insurance companies, as Mr. Abramowitz said, some cases  
21 three years ago, two years ago, or a year ago and the  
22 government has had access to. They are policy file documents.  
23 That's why they're on this stipulation because the government  
24 is not going to object on hearsay grounds. They may object on  
25 relevance, they may object on 403. That's reserved.

DA1JBIN3

Trial

1 MR. FISCHER: What we have done, your Honor, this  
2 reflects the defense's Exhibit 3001 through 3076 as given to  
3 the government I think over a week ago or over a week ago.

4 In the interim, we have been working around the clock  
5 to make this presentation, identified additional exhibits we  
6 have provided to the government. Three other series of  
7 exhibits we request they be put on this chart, on this file,  
8 and they are of the same kind, they are from policy file  
9 documents, insured policy filed documents.

10 THE COURT: Can I stop with 3001 through 3076.

11 They're clearly on the stipulation, right? So the  
12 government has waived any hearsay or foundational objection to  
13 the introduction of those documents. So, Ms. McCallum, what is  
14 the basis for the government's objection for the documents  
15 coming in?

16 MS. McCALLUM: Relevance and admissibility, your  
17 Honor.

18 THE COURT: Admissibility? First of all, relevance,  
19 you're wrong. Now, relevance, you lose.

20 Now, admissibility, what is the federal rule of  
21 evidence that has led you to admissibility. They're  
22 inadmissible because it is hearsay? They're inadmissible?

23 MS. McCALLUM: Rule 403. It relates to --

24 THE COURT: Oh, no, no, no, no. So sorry, not 403.  
25 They're admitted.

DA1JBIN3

Trial

1 (Defense Exhibits 3001 through 3076 received in  
2 evidence)

3 MR. ABRAMOWITZ: Just so you'll know, when we make the  
4 presentation, there will be other similar documents in the  
5 series.

6 THE COURT: Will you listen to me? Will you listen to  
7 me? I am just sorry I didn't send the jurors home altogether,  
8 right?

9 I need a list. I need copies of documents. 3001  
10 through 3076, if the government's objection is relevance and  
11 403, it is the first time I have ever had the government say  
12 that a document that has probative value is too prejudicial.  
13 Usually that is the argument that the defense makes, and the  
14 government says yeah, right, it is prejudicial because it shows  
15 he's guilty.

16 MR. ABRAMOWITZ: We're saying it in reverse.

17 THE COURT: Correct, you're saying it in reverse.  
18 What is good for the goose is good for the gander.

19 MR. ABRAMOWITZ: May I suggest the following?

20 THE COURT: If there are other documents?

21 MR. ABRAMOWITZ: They're of a similar nature. I will  
22 be glad to give you our --

23 THE COURT: I am perfectly willing -- if the  
24 government is not prepared to enter into the kind of  
25 stipulation, which is their right, they can try their case the

DA1JBIN3

Trial

1 way they want -- I am perfectly willing to adjourn this trial  
2 until you can subpoena people in here to authenticate them as  
3 business records.

4 MR. ABRAMOWITZ: They have been authenticated. All I  
5 am suggesting is I have given you samples, there will be other  
6 similar things in that series that they stipulated to. They're  
7 policy files. They're coming from --

8 THE COURT: I am telling you if the government isn't  
9 willing to agree that the documents that you wish to introduce  
10 are subject to this stipulation, we will adjourn the trial, you  
11 can subpoena people from the insurance companies, and they can  
12 come in and authenticate the documents and indicate that they  
13 were prepared in the ordinary course of business of the  
14 insurance companies, that it was the business of the insurance  
15 companies to prepare such documents and that the person who was  
16 preparing the documents was under a duty, okay?

17 If they really want the insurers to come in and say  
18 that, then the insurers can come in and say that. To the  
19 extent there is a relevance objection to any document that does  
20 not violate the company's policy to do that, so it shouldn't  
21 have been introduced, the government is free to assert on a  
22 document-by-document basis.

23 For that, I need documents.

24 MS. McCALLUM: I do want to be clear that the exhibits  
25 that are covered by that stipulation, first of all, are not

DA1JBIN3

Trial

1 limited to the ones we have heard about during this trial,  
2 okay? The scope is much larger than that.

3 MR. ABRAMOWITZ: That's right.

4 THE COURT: Here is the deal. The jurors are going to  
5 go home. I want a copy of every document that is part of the  
6 defense presentation. I want it after lunch. I want other --  
7 we are going to go through them one-by-one, one-by-one we are  
8 going to find out what the objections are to those exhibits.  
9 We are going to see what comes in and what does not. We are  
10 going to see what witnesses we need to have available in order  
11 to authenticate documents, to lay foundations, to do whatever  
12 has to be done.

13 MR. FISCHER: Your Honor, on the stipulations, just to  
14 clarify, the 3000 series up to 3076 is on this non-hearsay  
15 stip, and we can all agree on that. The issue is there were  
16 other documents identified because we are doing this on a  
17 realtime basis and providing it to the government on a realtime  
18 basis.

19 THE COURT: I hear you.

20 MR. FISCHER: The government's objection, your Honor,  
21 was not that -- it is a timing issue. We are not going to  
22 include it on the stip. It is a timing issue. We need to  
23 review the documents. If it comes from the policy file similar  
24 to why these documents were included here, we are not going to  
25 object on a hearsay basis.

DA1JBIN3

Trial

1 THE COURT: I hear you. I hear you, okay? I hear  
2 you. I am not privy to or party to your conversations. I am  
3 telling you how we are going to do this. We are going to do  
4 this the old fashioned way, the formal way, piece of paper by  
5 piece of paper. That is how we are going to spend our  
6 afternoon, and then there won't be any doubt or any question.  
7 I have had people get up here and say it is our company policy  
8 that we don't do these kinds of things.

9 Now, I can see policies slipping through, but if the  
10 files are replete with underwriters saying it looks like IOLI  
11 to me, looks like STOLI to me, and the policies are issued  
12 nonetheless, I am letting it in.

13 MR. ABRAMOWITZ: Your Honor, may I simply just suggest  
14 the following rather than send the jury home. If we could  
15 spend, if we could spend some time with the government, I will  
16 show them the rest of the outline, and I will show them the  
17 exhibits --

18 THE COURT: You guys need to have lunch. I need to  
19 have lunch.

20 MR. ABRAMOWITZ: I am reluctant to lose the time, your  
21 Honor.

22 THE COURT: I understand you don't want to lose the  
23 time.

24 MR. ABRAMOWITZ: We don't need to, either.

25 THE COURT: I don't know that we don't need to. The

DA1JBIN3

Trial

1 jurors are coming back at 1:30. If we are not ready to go by a  
2 quarter of 2:00 or 10 of 2:00, then I will send them home and  
3 we'll get ourselves ready to go so tomorrow we can go.

4 MR. ABRAMOWITZ: I think we can, if I have a few  
5 minutes with the government, I really can show them the rest.

6 THE COURT: Good.

7 MR. ABRAMOWITZ: All of the --

8 THE COURT: Probably it is helpful for the government  
9 to know that I really don't buy their relevance or 403  
10 objections in the circumstances after seeing what I have seen.

11 MR. ABRAMOWITZ: Therefore, I hope that they will just  
12 put their objection on the record, but that we can proceed this  
13 afternoon, and I think we will not be wasting anybody's time by  
14 doing that.

15 THE COURT: Okay.

16 (Luncheon recess)

17 (Continued on next page)

DA1JBIN3

Trial

1 AFTERNOON SESSION

2 1:50 pm

3 (Trial resumes)

4 (In open court; jury not present)

5 THE CLERK: Come to order, please be seated. Case on  
6 trial continued. The government and defendants are present.  
7 The jurors are not present.

8 MS. McCALLUM: The government requests a little bit  
9 more time to go through these files. I have confidence we will  
10 be able to resolve any issues over these documents with defense  
11 counsel if we are just granted the afternoon to review them.

12 THE COURT: I think that sounds like a very sensible  
13 suggestion. I would apologize profusely to the jury and take  
14 all the blame.

15 MR. ABRAMOWITZ: Before you ask the jury to come in,  
16 do you want to try to anticipate the schedule for the rest of  
17 the week?

18 THE COURT: Well, sure, that is a great idea actually,  
19 Mr. Abramowitz. We actually had a trial where we had a juror  
20 who would come out of the jury room and peek during -- yes, we  
21 did have a juror. We don't want to do that again. I don't  
22 think this jury has a similar individual. We did let him go.

23 So, yes, you tell me. You tell me what the schedule  
24 is. We're on tap for Wednesday and Thursday. They'll  
25 deliberate Friday if they're deliberating. I don't know if



DA1JBIN3

Trial

1 they'll be deliberating.

2 MR. ABRAMOWITZ: This presentation in its full form  
3 probably takes two hours at the most.

4 THE COURT: Right.

5 MR. ABRAMOWITZ: And there were other documents.

6 THE COURT: This is a week. Every now and again I  
7 like to remind you -- your client is Michael Bindow -- you are  
8 going to put on this presentation which is applicable to all  
9 three defendants. Is Mr. Bindow going to add anything  
10 more?

11 MR. ABRAMOWITZ: Just documents, your Honor.

12 THE COURT: How about Mr. Kergil?

13 MR. ABRAMOWITZ: One second. Perhaps a custodian  
14 witness, but I am trying to work that out with the government  
15 as well.

16 THE COURT: If we have to, we have to.

17 MR. STAVIS: As I informed the government this  
18 morning, Mr. Kergil will not be testifying on his own defense.  
19 We have just two or three documents, possibly a custodian. If  
20 not, then we can just go with our few documents and that would  
21 be our case.

22 THE COURT: Ms. Murray?

23 MS. MURRAY: As I advised the government, Mr. Resnick  
24 will not be exercising his right to testify. Also I am working  
25 on a stipulation with the government or I may call Agent

DA1JBIN3

Trial

1 McDonald for a brief direct.

2 THE COURT: I figured somebody was going to call Agent  
3 McDonald. Then I will take the hint and I assume you will have  
4 some sort of rebuttal case?

5 MS. McCALLUM: Yes, I think that is a fair assumption,  
6 not very long, your Honor.

7 THE COURT: Okay. So if you're going to take, the  
8 defense will take between two and three hours tomorrow, and the  
9 government will put on a short rebuttal case and we are going  
10 to have a charge conference, that will consume tomorrow. That  
11 would mean that we will have summations on Thursday and a  
12 charge on Monday morning. That sounds like to me -- or  
13 summations may go over into Monday. We will not have  
14 summations starting on Monday.

15 MR. ABRAMOWITZ: No, no, no, I wasn't going to suggest  
16 that, but we would like to try to avoid having all the defense  
17 summations on Thursday and then the rebuttal summation on  
18 Monday.

19 THE COURT: Well, that depends on how long they take,  
20 Mr. Abramowitz. That just depends on how long they take.  
21 We'll work for a full day. My guess, knowing you guys, is that  
22 we'll end up getting through two of the three defense  
23 summations on Thursday, but I don't know. If we get through  
24 them all, if we get through everything and everything is short,  
25 I will make the government do its rebuttal summation on

DA1JBIN3

Trial

1 Thursday. All the summations, everybody should be ready to sum  
2 up on Thursday.

3 MR. ABRAMOWITZ: Can we start a little earlier and end  
4 later so all the summations get done if we can?

5 THE COURT: We'll do our damnest, okay?

6 MR. ABRAMOWITZ: Say it again.

7 THE COURT: I'll do my best. I'll do my west best.  
8 Could we have the jury.

9 THE CLERK: Yes, your Honor.

10 THE COURT: I am going to spend the afternoon  
11 reworking the charge.

12 (Jury present)

13 THE COURT: Okay. Don't get too comfy.

14 In every trial there is a day like today. It is the  
15 day when we are trying to tie everything up and we try to do it  
16 quickly because we don't want to be a burden to you, and we end  
17 up realizing somewhere about halfway down the pike that if we  
18 don't slow down, we're just going to confuse you.

19 So we reached that point about a quarter of 1:00, at  
20 which time it was too late to telephone you all and tell you to  
21 go home. So we're going to send you home. We are going to  
22 finish our work this afternoon, which is going to streamline  
23 things I think by a whole day, so you will have lost a day, and  
24 I apologize for that, but we will gain a day at the other end.

25 After talking to the lawyers, I believe that tomorrow

DA1JBIN3

Trial

1 there will be some kind of a case that will go on with the  
2 defense and, of course, the government has the burden of proof.  
3 So the government has an opportunity to present something  
4 called a rebuttal case if it wants to do so, and the government  
5 has indicated that it may have some rebuttal case.

6 I think that is what you all will be listening to  
7 tomorrow. Then I'll probably be excused a little bit early  
8 because we have to have a conference about the charge once all  
9 the evidence is in and before you hear the summations.

10 Thursday it looks like you will be hearing summations.  
11 Whether we get through all of them on Thursday or not I don't  
12 know. We have a total of five summations. The government goes  
13 first. Each of the defendants gets to sum up and the  
14 government, the party with the burden of proof, gets to go  
15 last, but we will definitely be charging you on Monday. You  
16 may hear a couple of summations before that. We'll definitely  
17 be charging you, you will definitely start deliberating on this  
18 case next Monday, okay?

19 So that's the schedule. We're still ahead. I  
20 apologize for today, I really do in every way. I know it is  
21 frustrating to come in and not do anything or work for 15  
22 minutes. Don't communicate about the case tonight. Keep an  
23 open mind, and I will see you tomorrow morning. We will get  
24 started at exactly 10:00 o'clock.

25 (Jury excused)

DA1JBIN3

Trial

1 THE COURT: Okay. Go to work. It will take me a  
2 minute to log out and get out of here.

3 (Court adjourned until Wednesday, October 2, 2013, at  
4 10:00 o'clock am)

DA1JBIN3

Trial

## GOVERNMENT EXHIBITS

Exhibit No.

Received

6001, except Government Exhibit 2005, 1211

## DEFENDANT EXHIBITS

Exhibit No.

Received

3001 through 3076 . . . . .1269